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No.

In the Supreme Court

OF THE

United States

October Term, 1985

RALPH T. DUFFY, JR.,

Petitioner,

vs.

THE CITY OF LONG BEACH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the City of Long Beach, California, may declare by City Ordinance that real property under construction for a period of five years is a nuisance, per se, and apply this ordinance retroactively, without due process nor by application of the substantive law of California, leading to the destruction of said real property by the City of Long Beach, without just compensation to the owner of the property?

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PETITION FOR WRIT OF CERTIORARI

TO

UNITED STATES COURT OF APPEALS,

NINTH CIRCUIT

To The Honorable Chief Justice of the United States, and to The Associate Justices of the United States Supreme Court:

Petitioner Ralph T. Duffy, Jr. files this Petition for Writ of Certiorari to review the judgment of the United States

Court of Appeals for the Ninth Circuit which affirmed the judgment of the Trial Court in granting summary judgment to the City of Long Beach thus allowing for the destruction of Petitioner's home as a nuisance without just compensation.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is attached as Appendix A. A copy of the Findings of Fact and Conclusions of Law of the trial court is attached as Appendix B.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Memorandum Opinion of the Court of Appeals is dated and entered on August 13, 1984. A timely petition for rehearing was denied on November 20, 1984, and suggestion for rehearing en Banc was rejected on January 14, 1985.

Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the tenth section of Article I of the Constitution of the United States, which provides in relevant part:

"No State shall...pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts..."

This case also involves the first section of the Fourteenth Amendment of the Constitution of the United States, which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also involved is California's nuisance statute found at Civil Code Section 3479, which provides:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, or any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance."

Also involved is the Municipal Code of Long Beach, as amended from time to time, pertaining to a public nuisance, which provides as follows on the dates indicated:

December 16, 1975

Section 4611.10 - Nuisance - Maintenance of Property -

"It is hereby declared a public nuisance for any person owning, leasing, occupying or having charge or possession of any premises in this City to maintain such premises in such a manner that any of the following conditions are found to exist thereon:

(e) Buildings which are abandoned, boarded up, partially destroyed, or left unreasonably in a state of partial construction; "

July 8, 1982

Section 4611.10 - Nuisance - Maintenance of Property -

"It is hereby declared a public nui-

sance for any person owning, leasing, occupying or having charge or possession of any premises in the City to maintain such premises in such manner that any of the following conditions are found to exist thereon:

(a) Buildings, which are abandoned, boarded up, partially destroyed, or left for unreasonably long periods of time in a state of partial construction."

November, 1982

8.76.010 Nuisance Consitions:

"It is declared a public nuisance for any person owning, leasing, occupying or having charge or possession of any premises in this city to maintain such premises in such manner that any of the following conditions are found to exist thereon:

A. Buildings which are abandoned, boarded up, partially destroyed, or left for unreasonably long periods of time in a state of partial construction; provided

that any unfinished building or structure which has been in the course of construction five years or more, and where the appearance and other conditions of said unfinished building or structure substantially detracts from the appearance of the immediate neighborhood or reduces the value of property in the immediate neighborhood or is a nuisance, shall be deemed and presumed to have been left for an unreasonably long period of time in the sense of this subsection; "

STATEMENT OF THE CASE

In 1968, Duffy began the fulfillment of a life-long ambition to build his own home through his own labor on three city lots he owned in Long Beach, California, under proper permits issued by the City. No time limit for completing construction was contained in the permits nor by city ordinance.

Frequent exhortations by city officials

to finish the home culminated in Duffy being prosecuted for maintaining a nuisance, a misdemeanor. On advice of counsel, now deceased, Duffy pled nolo contendere in 1979, was fined and placed on one-year probation. Over the next two years, Duffy served over 30 days in jail for violating the terms of probation in not completing the home. At this point, the home was completely framed, wired, plumbed, roofed, enclosed with a wall with locked ornamental iron gates, and as a condition of probation, had a false front to give the appearance of a completed structure from the street.

In December of 1982, the City ordered the destruction of Duffy's home as a nuisance. Duffy's second attorney sought a temporary restraining order in State court without success. Appeals to the State Court of Appeals and the State Supreme Court were denied.

Duffy filed the within action through his present, and third, attorney on April 4, 1983, and a temporary restraining order was granted by the District Court, based on the City's failure to provide Duffy with a due process hearing.

On July 5, 1983, the City Council went through the motions of providing Duffy with a "due process" hearing, allowing unsworn, opinion testimony. Under the new, and latest, city ordinance, there was a presumption of nuisance, requiring Duffy to prove his house was not a nuisance. The City made no attempt to show a nuisance in fact existed, but rather concentrated on the five plus years of construction as evidence of a nuisance per se. Without debate, the City Council found a nuisance and gave Duffy two months to complete the home - but refused to issue him permits.

On August 23, 1983, the City's mo-

tion for summary judgment was heard, and granted, and the preliminary injunction dissolved.

Duffy filed notice of appeal and moved the Ninth Circuit Court of Appeals to restore the injunction on September 8, 1983, which was granted on October 3, 1983.

The ninth Circuit Court of Appeals affirmed the granting of summary judgment on August 13, 1984. Duffy moved for rehearing and rehearing en Banc which was denied on November 20, 1984, and January 14, 1985, respectfully.

Just before Christmas, 1984, the City destroyed Duffy's home and has since billed him over $4,000.00 for the cost.

REASONS FOR GRANTING THE WRIT

The statement of Questions Presented for Review, supra, sets forth important questions regarding Constitutional protection of a private citizen to build his own home with his own labor without cities

responding to the political pressures of building contractors through passage of overly broad and unconstitutionally vague nuisance ordinances. Certiorari should also be granted to resolve conflicts in principle among the lower courts.

These questions do not deal with zoning, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), nor with billboards, Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), nor with the wisdom of a housing tract, Berman v. Parker, 348 U.S. 26 (1954). Rather, this case deals with the taking of property under the of a nuisance ordinance, creating a nuisance per se, by City fiat.

This case is an anomaly to the prior holdings of the Ninth Circuit as well as this Honorable Court. In In Re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301 (9th Cir., 1982) at ff.7, 1311, the Court found the law as to a taking

under the Constitution enunciated in San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) to be:

> "Thus, we take it to be the view of the majority of the Supreme Court that 'the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
>
> . . . . . .
>
> We assume that the excessive exercise of the government's law-making power may constitute a 'taking' under the Fifth Amendment, for which just compensation must be paid. See, e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104, 122 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155,

168 (1958)."

Again, in PVM Redwood Co., Inc. v. United States, 686 F.2d 1327, 1333 (9th Cir., 1982), the Court makes clear that a taking no longer requires the transfer of physical control over a portion of property, citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979):

> "Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors - such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action - that have particular significance."

This position was reaffirmed in Hodel v. Virginia Surface Mining & Reclaimation Assn., 452 U.S. 246, 295 (1981).

Thus, the "factual inquiries" required to be made by the trier of fact, in this

case a jury, cannot be made by summary proceedings. See Scheuer v. Rhodes, 416 U.S. 232 (1974).

Even a cursory review of these "factual inquiries" as applied here show the arbitrariness and capriciousness of the City ordinances.

Economic Impact:

Assuming, en arguendo, that the five-year limit on construction can be applied retroactively, infra, such a restriction would prevent anyone from building their own home to completion. If the ordinance were equally applied, which it is not, a major edifice would die on the drawing boards. The Cathedral of Notre Dame, which took over 100 years to build, would be a nuisance in Long Beach. It can be truthfully said a home is never completed. The effect of the five-year limit is to force a property owner to hire a contractor or give up his regular employment to

build full-time, which then prevents him from getting financing or the money for construction.

Also under the ordinance, a building owner who boards up his unrented store to protect the plate glass would run the risk of having his building destroyed as a nuisance. Such would depend on the whim of the City and the amount of political pressure the owner could bring to bear.

The ordinance also declares a partially destroyed building to be a nuisance. In New Hampshire Fire Insurance Co. v. Murray, 105 F.2d 212 (1939), the court struck down a city ordinance that a building 50% destroyed by fire was a nuisance per se and could be razed. The court held a requirement that an imminent threat to public health and safety must first be shown and no facts were presented to show repairs could not be made.

In the District Court's Findings of

Fact, the Magistrate found the property was overgrown with weeds. Even if true, you do not destroy a home to eliminate weeds.

Interference with Investment Backed Expectations:

When Duffy began his construction, there was no five-year limitation on construction. All that was required was that he not abandon his work. He ultimately invested over $100,000.00 in improvements, only to have a five-year limitation imposed on him in 1982, retroactively, infra. Duffy reasonably believed from the state of the law when he began that he could build his own home, through his own efforts, on his own land, albeit slowly.

Character of Government Action:

The character of the City's actions is particularly offensive to the Constitution of the United States in the gross denial

of equal protection and due process, infra. But for the injunction of the District Court, the City would have razed Duffy's house without any hearing. The "taking" of private property without compensation to the owner under the guise of an overly broad, vague, and changing nuisance ordinance requires the close scrutiny of this Honorable Court.

Nuisance:

With the decision in this case by the Ninth Circuit, we have a split in the Circuits as well as a departure from California law as interpreted by the Ninth Circuit. The landmark case in the law of nuisance is Yates v. Milwaukee, 77 U.S. 497 (1871), wherein the City declared any wharf extending beyond an artificial "dock line," was a nuisance, per se, and an obstruction to navigation. This Court struck down that ordinance because, inter alia, there was no showing that a nuisance

and obstruction in fact existed.

The Eighth Circuit followed this reasoning in Hennessy v. St. Paul, 37 F. 565 (8th Cir., 1884), holding the City could not declare a nuisance by mere resolution.

The Ninth Circuit in this decision now allows the City of Long Beach to create a nuisance by ordinance in resolving that any building under construction for five years is a nuisance, without any showing that a nuisance, in fact, exists. This is directly contra to Yates and Hennessy, supra.

Since a nuisance in fact must be shown, whether Duffy's house is a nuisance or not cannot be disposed of by summary disposition, Scheuer, supra.

Equal Protection and Due Process:

Under the Fourteenth Amendment of the United States Constitution, Duffy is entitled to equal protection of the laws of the State of which he is a citizen. The

most recent statement of the law as to summary abatement of nuisances under the police powers of a city is found in Leppo v. City of Petaluma, 20 C.A.3d 711, 97 Cal. Rep. 840 (1971), rehearing denied, November 8, 1971, Supreme Court of California denied hearing, December 16, 1971.

The Leppo court held that due process of law requires a judicial or administrative determination that the subject property falls within the legal concept of a nuisance and that in fairness and justice there is no other way to reasonably correct the nuisance, based on competent, sworn evidence.

Further, Leppo held the burden of proof is on the City to prove a nuisance in fact exists and of the necessity of immediate abatement. See Lawton v. Steele, 152 U.S. 133, 135.

This substantive law of California was totally ignored by the City as well as the

Ninth Circuit. The latest City ordinance applied to Duffy creates a reubttable presumption of nuisance, thus placing the burden of proof on Duffy to prove his home is not a nuisance.

The "due process" provided Duffy by the City was a travesty. City employees, who admitted never inspecting the home, were allowed to give opinion testimony that the structure was a nuisance because it was uncompleted. They also admitted the construction posed no hazard to anyone and was not in danger of collapsing. A general contractor, duly sworn, inspected the house and found it surpassed building codes and could not be distinguished from other homes on the street due to the facade erected. Unsworn spectators in Councis Chambers were allowed to give their opinions. The Mayor insisted the only issue was why the home was not completed. No effort was made to comply with the Leppo requirements.

The City Council gave Duffy two months to complete the home, declaraing it a nuisance, and then refused to issue building permits to him.

Due process has been defined by this Court as the denial of fundamental fairness, shocking to the universal sense of justice, Kinsella v. U.S., 361 U.S. 234. California requires more than mere formalism, but substantive due process, and the more important the rights at stake, the more important must be the procedural safeguards, Charles S. v. Board of Education, 20 C.A.3d 83. Whether due process has been provided or not is a question of fact, In re Greenfield, 11 C.A.3d 536, thus precluding summary disposition.

Ex Post Facto:

Under California Civil Code 3491, a nuisance may be abated in three ways: (1) indictment or information, (2) a civil action, or (3) abatement. Thus, the City's

nuisance ordinance is a criminal statute, a misdemeanor, for which Duffy may be, and has been, jailed. The Supreme Court must set aside any retroactive criminal statute, Rosenberg v. U.S., 346 U.S. 273 (1953).

The latest City ordinance, passed in 1982 during the course of Duffy's litigation with the City, was applied to him, making criminal that which was not the case prior thereto. Rather than exacting criminal penalties for a misdemeanor, the City destroyed over $100,000.00 worth of Duffy's property, without compensation.

Duffy had no obligation to complete his construction in five years prior to November of 1982. Yet, this did not prevent the City from imposing their five-year rule in July of 1983. This assumes the five-year rule is valid in creating a nuisance, per se, which it is not under both Federal and State law.

Viewed another way, Duffy entered into a contract with the City upon issuance of building permits, that his structure would comply with inspection standards and he would not abandon the work nor allow it to become a danger to his neighbors. See City Ordinance of December, 1975. In 1982, the City decided to change the terms of the contract and apply the changes retroactively.

There seems no dispute that Duffy's home exceeded City building standards, met zoning requirements, and posed no threat to the health and safety of his neighbors. The facade allowed it to blend in with other homes. The work was never abandoned and progressed nicely, albeit slowly, until 1979 when the City began proposing imminent destruction and jailing Duffy on week-ends so as to prevent him working on the house.

CONCLUSION

For all of the reasons stated above, this Petition for writ of certiorari should be granted.

Respectfully submitted,

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(Appendices follows)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6220
DC No. CV 83-2034

Ralph t. Duffy, Jr.,
Plaintiff-Appellant,
vs.
City of Long Beach,
Defendant-Appellee.
(Filed August 13, 1984)

MEMORANDUM/[1]

Appeal from the United States District Court for the Central District of California
Ralph J. Geffen, Magistrate, Presiding

Before: CHAMBERS, TANK, and BOOCHEVER, Circuit Judges.

Duffy appeals from summary judgment in favor of the city, dismissing his action brought under 42 U.S.C. §1983, and claiming a right to injunctive and declaratory relief, and damages, for violation, inter alia, of his rights under the 14th Amendment. He has owned property in Long Beach since 1968, when he began construction on

the property with the usual permits. Ten years later the construction was still incomplete. He pleaded nolo contendere to nuisance and was sentenced to probation. He was later prosecuted for violation of probation. The construction remained incomplete and in October 1982 the city ordered him to abate the nuisance by December 1982. He refused to comply and, after a hearing, the city on December 23, 1982, gave notice that it would undertake the abatement ten days hence.

He filed an action in the California Superior Court, but never apparently served the city, and did not proceed on the substantive issues after a temporary restraining order was refused. Appellate courts refused to interfere in the refusal. Instead of pursuing his remedies in the State courts, he filed this action in district court claiming interference with his federal constitutional

rights.

The city thereafter provided another hearing on his claim, thus rendering moot his arguments that the previous hearing denied him due process. In any event, a review of the record discloses that his due process rights were sufficiently protected and his claim on this score is without merit. Similarly without merit are his claims of selective enforcement of the city nuisance statute; the record of his inactivity and delay refutes any such argument.

Appellant also argues that Long Beach Municipal Code Section 8.76.010A is unconstitutional for vagueness./[2] We agree totally with the district court's conclusions on this issue; we find no unconstitutional vagueness.

Affirmed.

/[1] The panel has concluded that the is-

sues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

/2 "It is declared a public nuisance for any person owning, leasing, occupying or having charge of possession of any premises in this city to maintain such premises in such manner that any of the following conditions are found to exist thereon:

A. Buildings which are abandoned, boarded up, partially destroyed, or left for unreasonably long periods of time in a state of partial construction, provided that any unfinished

building or structure which has been in the course of construction five years or more, and where the appearance and other conditions of said unfinished building or structure are such that the unfinished structure substantially detracts from the appearance of the immediate neighborhood or reduces the value of property in the immediate neighborhood or is a nuisance, shall be deemed and presumed to have been left for an unreasonably long period of time in the sense of this subsection."

APPENDIX B

United States District Court

Central District of California

Ralph T. Duffy, Jr., Plaintiff,

vs.

City of Long Beach, Defendant.

No. CV 83-2034

Findings of Fact and Conclusions of Law

Filed August 26, 1983

The motion of defendant, CITY OF LONG BEACH, for summary judgment and termination of preliminary injunction came regularly for hearing on August 23, 1983, before the Honorable Ralph J. Geffen, United States Magistrate presiding; Bruce Stark appeared as counsel for plaintiff and Robert W. Parkin, City Attorney, by Arthur Y. Honda, Senior Deputy City Attorney, appeared as counsel for defendant. The Court having examined the pleadings, records and

exhibits, having heard arguments of counsel, and having granted defendant's motion for summary judgment and termination of preliminary injunction, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, Ralph T. Duffy is the owner of the property located at 370 Flint Avenue, Long Beach California.

2. The defendant, City of Long Beach is a municipal corporation, organized and existing as a charter city pursuant to the laws of the State of California and is located in the County of Los Angeles, California.

3. Plaintiff began construction of the existing unfinished structure at 370 Flint Avenue in 1968 after the original building permit was issued on June 28, 1968.

4. After fifteen years, the structure at 370 Flint Avenue is still unfinished

and is merely an open frame shell with a roof covering. The front is a "false" front, not part of the structure but only a temporary plywood covering. The wood frame shell has been exposed so long without adequate protection covering that at least half of it has deteriorated and become unusable.

5. The last meaningful work done on the unfinished structure was on December 10, 1979, when a roof covering was installed; all building, electrical, plumbing and mechanical permits have expired and may not be renewed. To complete the structure, new permits and new plans complying with current code requirements are required.

6. Since August 3, 1976, the City tried through administrative and criminal proceedings to have Mr. Duffy complete the building and otherwise abate the public nuisance but all such efforts have failed.

Plaintiff has been afforded ample time and opportunity to complete the building but has failed to comply.

7. The premises at 370 Flint Avenue is habitually overgrown with weeds and vegetation.

8. The unfinished structure at 370 Flint Avenue is an "eye sore" and detracts from the appearance of the neighborhood and has tended to reduce property values in the neighborhood.

9. The unfinished structure, at 370 Flint Avenue has been in a state of partial construction for an unreasonable period of time (over fifteen years) and is a public nuisance in violation of Section 8.76.010A of the Long Beach Municipal Code.

10. After the filing of the complaint and on July 5, 1983, the City Council of the City of Long Beach gave the plaintiff Duffy a fair hearing before finding that

his property at 370 Flint Avenue was a public nuisance under Section 8.76.010A of the Long Beach Municipal Code. Plaintiff was ordered to complete or demolish his structure by September 6, 1983.

11. Plaintiff's "fair hearing" contentions have thus become moot because there is no reasonable expectation that such alleged violations will recur and subsequent events (a new hearing) have eradicated the effects of such alleged violations.

CONCLUSIONS OF LAW

1. There are no genuine triable issues of material fact remaining in the complaint and no deprivation of any federally protected rights.

2. Plaintiff was given a fair, due process hearing by the Long Beach City Council on July 5, 1983; thus his "fair hearing" allegations have become moot.

3. Considering all the circumstances

recited in the "Findings of Fact", the City Council's order requiring completion or demolition by September 6, 1983, is reasonable and appropriate.

4. Section 8.76.010A of the Long Beach Municipal Code is a valid and constitutional police power measure declaring a statutory public nuisance, and it is not vague.

5. The City of Long Beach did not engage in invidious selective enforcement of the ordinance.

6. This Court abstains from further consideration of this matter since plaintiff has an adequate State remedy in Code of Civil Procedure Section 1084.5 (administrative mandate).

7. The defendant's motion for summary judgment and termination of preliminary injunction is granted and the complaint is hereby ordered dismissed.

Dated: August 26, 1983.

/s/ Ralph J. Geffen

United States Magistrate